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MCLE SELF-STUDY

Litigating the Ten Commandments

By David Weinstein, Esq.*

In the 1950s, Minnesota juvenile court judge E.J. Ruegemer, concerned about rising juvenile delinquency, determined to disseminate a "code of conduct" to motivate youth to higher standards of behavior. Under his inspiration, the Fraternal Order of Eagles ("FOE") donated to municipalities across America stone monuments depicting the Ten Commandments. The monuments set forth an ecumenical translation not found in any religious text, with the first commandment ("I am the Lord your God") in large lettering. Each structure was adorned with a Jewish star and the Greek letters Chi and Ro, symbolizing Christ. They also contained various American symbols, such as the eagle and flag, and other marks of less clear import, including a "seeing pyramid" like that found on the dollar bill.

With the exception of one unsuccessful challenge in the 1970s, the FOE monuments stood unmolested in front of numerous local courts and statehouses until very recently. In the past several years, however, courts have struck down many such displays, as well as other efforts by legislatures, municipalities and judges to publicly exhibit the Decalogue.

Attempts to remove such monuments have often prompted shock, protest and outrage.[1] But the legal principles that have led courts to find them unconstitutional are not new. Since the 1980s courts have enjoined displays of religious symbols on public property, on the ground that they breached the First Amendment's wall between church and state. Those rulings and the standards they articulated set the ground rules for the legal war now raging over the Ten Commandments.

I. THE LEMON TEST

Courts reviewing the propriety of Ten Commandments monuments on public property have looked initially to the factors set forth in Lemon v. Kurtzman.[2] Under the "Lemon" test, a government policy, practice or statute violates the First Amendment's Establishment Clause if: (1) it lacks a secular purpose; (2) its primary effect is the advancement or inhibition of religion; or (3) it fosters excessive entanglement with religion.[3] Although numerous Justices have criticized Lemon,[4] the case has never been overruled, and thus lower courts are bound to follow its dictates.

The Supreme Court's efforts to apply the Lemon test to government-affiliated displays of religious symbols have resulted in confusing and seemingly contradictory rulings. In Lynch v. Donnelly,[5] the Court upheld a publicly funded Christmas display that included a crèche, Santa, Christmas tree and season's greetings sign. In support of this decision, the Court cited the long history of governmental acknowledgement of religion, noting among other examples a frieze on the Supreme Court wall depicting lawgivers, including Moses carrying the Ten Commandments.[6] The Court further found that the Christmas display at issue had the secular purpose of celebrating and depicting the origins of the holiday,[7] and was not rendered illegal because it "merely happens to coincide . . . with the tenets of some . . . religions."[8] In an important concurrence, Justice O'Connor added a new veneer to the second prong of the Lemon test: a display violates the Establishment Clause if it has the effect of "communicating a message of government endorsement or disapproval of religion."[9]

A divided Court adopted Justice O'Connor's "endorsement test," and applied it to two separate religious displays in County of Allegheny v. ACLU.[10] The first was a stand-alone crèche that the county had allowed a Catholic group to place in front of the Pittsburgh courthouse. The crèche was surrounded by poinsettias and backed by a banner reading "Glory to God in the highest" in Latin.[11] The second, nearby, display consisted of an 18-feet tall menorah and a 45-feet tall Christmas tree, with a sign describing the structures as a "salute to liberty."[12]

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The Court, through a cacophony of five separate opinions, struck down the crèche but upheld the constitutionality of the menorah-Christmas tree display.[13] Lynch notwithstanding, the Court found that a reasonable observer would view the Pittsburgh crèche in its context - located in the main part of the county seat, and bearing a religious message - as reflecting the government's imprimatur of Christianity.[14] In contrast, the Court found that the Christmas tree - deemed a secular symbol - predominated in the second display. That fact, along with the sign indicating the symbols' intended message of liberty, made it unlikely that an observer would view the tree and menorah as an endorsement of religion.[15]

In the course of a partial concurrence, Justice Stevens speculated on the constitutionality of a carving showing Moses carrying the Ten Commandments on a courtroom wall.[16] By itself, the display would be "equivocal," possibly showing respect of Judaism or religion in general. If other religious figures were added, the carving would impermissibly honor religion. On the other hand, if important figures in the development of secular law, such as Caesar and Napoleon, were added (as is the case with the frieze on the Supreme Court's wall), then the display would signal respect for "great lawgivers," and would not violate the Establishment Clause.[17]

II. A QUESTION OF CONTEXT

The teaching of these decisions is that, when courts are faced with the constitutionality of a religious display on public property, they must consider whether a reasonable person would deem it to be a government endorsement of religion. This question can only be assessed in light of the surrounding context - including the size and location of the religious symbols, and the placement of other symbolic markers nearby.

This amorphous standard has prompted much litigation and attracted widespread criticism. Dissenting in Allegheny County, Justice Kennedy declared that the Court's stated criteria would turn it into a "national theology board," left to decide Establishment Clause cases guided by "little more than intuition and a tape measure."[18] Seventh Circuit Judge Frank Easterbrook has commented that the task of determining the appropriate placement of religious displays is more appropriate for "interior decorators" than the judiciary.[19] Nonetheless, the rules set forth in Lynch and Allegheny County are those that inferior courts must follow in determining the legality of displays like the FOE monuments.

Despite Justice Stevens' dicta in Allegheny County, the Court as a whole has never directly addressed the constitutional validity of a Ten Commandments display on public property.[20] It has, however, given some guidance on this question in Stone v. Graham,[21] which struck down a Kentucky statute requiring that copies of the Ten Commandments be posted in public school classrooms. The Court stated that the "pre-eminent purpose" for posting the commandments was "plainly religious in nature."[22] Specifically, it emphasized that the commandments do not confine themselves to "arguably secular matters" such as murder and theft, but also address "the religious duties of believers," such as worshipping God and avoiding idolatry.[23] The Court was not swayed by the presence of a disclaimer, at the bottom of the poster, that the "secular application" of the Decalogue "is clearly seen in its adoption as the fundamental legal code of Western Civilization . . . ."[24] It noted that no effort had been made to integrate the display into the school's curriculum as part of an "appropriate study of history, civilization, ethics, comparative religion, or the like."[25] Stone is not necessarily dispositive on the question of Ten Commandments displays on public property; as defenders of their constitutionality have pointed out, the judiciary has exercised particular scrutiny over potential Establishment Clause violations in school settings.[26]

III. TEN COMMANDMENTS MONUMENT LITIGATION

Against this backdrop, federal courts have almost unanimously declared the FOE monuments to be unconstitutional.[27] They have similarly struck down most other displays of the Decalogue on public property, although some recent decisions have departed from this consensus.[28]

Under the first Lemon prong, numerous courts have declined to find a secular purpose to such displays. As in Stone, they have noted the religious nature of the first five commandments.[29] Further, they have been skeptical of "secular" justifications, particularly when given after the fact or when litigation seemed imminent. Although courts generally defer to legislatures' proffered secular rationales for acts challenged under the Establishment Clause, they will not defer to a "sham" explanation.[30]

Thus, in Books v. City of Elkhart,[31] the Seventh Circuit found that the FOE monument placed in front of an Indiana municipal building lacked a secular purpose despite a city council resolution declaring that the monument recognized the "historical and cultural significance" of the commandments, and their impact on Western law.[32] The court dismissed this justification as one made "on the eve of litigation."[33] Further, in contrast to the legislature's recent pronouncement, the court noted that a minister, priest and rabbi spoke at the monument's original dedication, and that many of the speeches at that time stressed religious themes.[34]

In other instances, government officials have sought to establish a secular purpose for such displays by citing historical evidence of support for religion by the state and various iconic American figures.[35] This, too, has proved insufficient to evade Establishment Clause scrutiny. Indeed, one district court dismissed an effort to place a Ten Commandments monument amidst various historical documents showing governmental praise for religion and the bible as merely reinforcing the message of "governmental endorsement . . . of religion over non-religion," and of Christianity in particular.[36] Courts have also rejected efforts to defend challenged displays on the ground that numerous federal buildings, including the Supreme Court frieze, display the Decalogue in some form.[37]

Most courts have also found that Ten Commandments monuments violate the second Lemon prong, as they would be perceived by a reasonable observer as an endorsement of religion. In regard to the FOE-sponsored displays, this conclusion has been based on a number of factors. First, the monuments set forth the first, and most clearly religious line of the commandments in large type.[38] Second, the displays contain explicit symbols of both Christianity and Judaism.[39] Third, courts have construed the presence of American national symbols - rather than giving the monuments a secular flavor - as emphasizing the connection between the state and the monuments' religion message.[40] Finally, each of these challenges concerned a display placed in a significant public place, such as a large park or in front of a courthouse or statehouse.[41]

Those defending the constitutionality of Ten Commandments monuments have contended that nearby secular plaques or memorials dilute any message of religious endorsement. These arguments, as well, have been largely unsuccessful. Thus, in Adland v. Russ[42], the Sixth Circuit struck down a display placed on capitol grounds, which included the FOE monument and seven other markers, including plaques commemorating various civil servants and a civil war memorial. The court noted that the Ten Commandments monument "physically dominate[d]" the area in which it was located.[43] Further, the remaining markers did not convey any "easily discernible, unified theme" that would undermine the religious message.[44] As a result, the court found that the monument, when viewed in context, conveyed a message of religious endorsement in violation of the Establishment Clause.

Although the majority of opinions addressing this issue have held Ten Commandments displays illegal, several decisions found that the history or context of particular monuments sufficiently mitigated any religious endorsement, allowing them to survive constitutional scrutiny.[45] Most important, the Third Circuit recently upheld the posting of the Decalogue on a Pennsylvania courthouse.[46] The court relied heavily on the fact that the plaque had been in place for eighty years, the county had taken no action on it during that time, the main entrance had been moved away from the plaque - whose text was no longer visible from street level, and no effort was then made to remove the display to a more prominent location.[47] Also, a federal district judge in North Carolina declined to enjoin the posting of the Ten Commandments in a county courthouse,[48] noting that during the dedication ceremony for the plaque 67 years earlier, the speakers had stressed the Greek derivation for the commandments, placing them in their historical context.[49]

Finally, a 4-3 majority of the Colorado Supreme Court declined to order removal of the FOE monument placed in a park in front of the Colorado Statehouse.[50] The court found it to be the smallest of numerous other commemorative markers in the area, and that the monument-filled park was analogous to a "museum," diluting the impact of a single, arguably religious, exhibit.[51]

These decisions, however, are a minority. Moreover, even in the event a Ten Commandments display passes muster under the Establishment Clause, it may well create additional litigation headaches for its progenitors. In particular, religious groups that feel slighted may seek to post their own religious symbols on the same public property. This tact has been taken successfully by Summum, a Utah-based religion founded in 1975. Twice, Summum has brought suit against Utah towns with FOE monuments, seeking inclusion of the Summum "seven principles" (including the principles of "Vibration," "Psychokinesis" and "Rhythm") alongside the Decalogue. In both cases, the Tenth Circuit found that the defendant municipalities had created a public forum in the parks at issue, and had engaged in viewpoint discrimination by permitting the FOE monument while excluding the Summum structure.[52] Thus, the public posting of the Ten Commandments may merely open the door to other religious displays.[53]

CONCLUSION

In 1993, Judge Marvin Shoob reassured concerned citizens that the Ten Commandments were "not in peril" as a result of his decision striking down a courtroom display under the Establishment Clause:

"They may be displayed in every church, synagogue, mosque, home and storefront. They may be displayed on lawns and in corporate boardrooms. Where this precious gift cannot, and should not, be displayed as a religious text is on government property."[54]

A decade later, Judge Shoob's dicta remains an accurate statement of the law, as most courts have construed it. The Ten Commandments may be included as part of a genuine historical or educational exhibit. If, however, they are placed on public property with the intention of conveying a religious theme, the display's sponsors or the governmental unit hosting it will likely find themselves on the wrong side of an Establishment Clause suit.

ENDNOTES

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1 See Hundreds in Ohio Protest Removal of Ten Commandments at Schools, http://www.suntimes.com/output/news/cst-nws-ten10.html (visited June 5, 2003); Gelb, Hundreds Protest Shrouding of Commandments, http://www.philly.com/mld/inquirer/3120463.htm; (visited July 6, 2003) See also Harvey v. Cobb County, Ga., 811 F.Supp. 669, 671 (N.D.Ga. 1993) (noting "phone calls and letters" to the court to "save the Ten Commandments").

2 403 U.S. 602 (1971).

3 Id. at 612-13.

4 See Lamb's Chapel v. Center Moriches School Dist., 508 U.S. 384, 398 (1993) (Scalia, J., concurring) (citing criticism of Lemon by five justices). Justice Scalia compared the Lemon test to "some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried." Id.

5 465 U.S. 668 (1984).

6 Id. at 675-77.

7 Id. at 681.

8 Id. at 682 (citing McGowan v. Maryland, 366 U.S. 420, 442 (1961)).

9 Id. at 692 (O'Connor, J., concurring). Some courts have viewed the endorsement test as a substitute for the first Lemon elements. See Books v. City of Elkhart, Indiana, 235 F.3d 292, 301 (7th Cir. 2000).

10 492 U.S. 573 (1989).

11 Id. at 580.

12 Id. at 581-82.

13 Only two justices - Blackmun and O'Connor - reached this precise result, but the crèche and Christmas Tree/Menorah rulings each garnered separate majorities.

14 Id. at 599-602.

15 Id. at 613-21.

16 Id. at 653-53.

17 Id. at 653. The Court addressed the question of religious displays on public property in one subsequent case, Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753 (1995). In Pinette, the Court held that an Ohio administrative body charged with regulating access to the square surrounding the statehouse could not bar the Ku Klux Klan from placing an unattended cross in the square, which the Court deemed a public forum. Four Justices held that the "endorsement test" - and thus the Establishment Clause – should have no role where a display is placed by a purely private actor. See id. at 763-770 (Opinion of Scalia, J.). In a concurrence joined by two other Justices, however, Justice O'Connor adhered to the view that a state's actions in operating a public forum and permitting religious speech there, could, in some cases, be construed as an endorsement of religion and thereby violate the establishment clause. Id. at 777. (O'Connor, J., concurring). The concurring Justices found, however, that under the circumstances of the case an observer would not have perceived the cross as a state endorsement of religion. Id. at 772.

18 Id. at 675, 678.

19 American Jewish Congress v. City of Chicago, 827 F.2d 120, 129 (7th Cir. 1987) (Easterbrook, J., dissenting).

20 Recently, three Justices voted to grant certiorari on a Seventh Circuit decision ordering the removal of a FOE monument, asserting that the structure did not express preference for religion, but rather reflected "the Ten Commandments role in the development of our legal system." City of Elkhart v. Books, 532 U.S. 1058, 1063 (2001) (Rehnquist, C.J., dissenting from denial of certiorari). Justice Stevens wrote separately in support of the lower court decision.

21 449 U.S. 39 (1980).

22 Id. at 41.

23 Id. at 42.

24 Id. at 41.

25 Id. at 42.

26 City of Elkhart, supra note 20 at 1061 (2001) (Rehnquist, C.J., dissenting from denial of certiorari) (citing Edwards v. Aguillard, 482 U.S. 578, 583-84 (1987)) (Supreme Court has been "particularly vigilant" in monitoring Establishment Clause compliance in schools); State v. Freedom from Religion Found., Inc., 898 P.2d 1013, 1023 (Colo. 1995) ("School religion cases require a more stringent analysis because of the age of the minds affected, and because students are captive audiences, easily susceptible to influence"). See also Freethought Society v. Chester County, Slip. Op. No. 02-11765, at 26 (3rd Cir. June 26, 2003) ("we do not believe that Stone holds that there can never be a secular purpose for posting the Ten Commandments, or that the Ten Commandments are so overwhelmingly religious in nature that they will always be seen only as an endorsement of religion; rather we conclude that Stone is fairly limited to its facts").

27 See Indiana Civil Liberties Union v. O'Bannon, 259 F.3d 766 (7th Cir. 2001); Books, supra note 9; Adland v. Russ, 307 F.3d 471 (6th Cir, 2002); ACLU Nebraska Found. v. City of Plattsmouth, Neb., 186 F.Supp.2d 1024 (D. Neb. 2002); see also Summum v. City of Ogden, 297 F.3d 995, 1000 n.3 (10th Cir. 2002) (concession that FOE monument did not violate Establishment Clause "may have been unwise"). But see Freedom from Religion Found., Inc., supra note 26 at 1026-27 (4-3 decision upholding FOE monument). These decisions have, however, attracted frequent dissents. See Adland, 307 F.3d at 490 (Batchelder, J., dissenting); Indiana Civil Liberties Union 259 F.3d at 773 (Coffey, J., dissenting); Books, supra note 9 at 311 (Manion, J., concurring in part and dissenting in part).

28 See Glassroth v. Moore, 229 F.Supp.2d 1290 (M.D.Ala. 2002), aff'd Slip. Op. No. 02-16708 and 02-16949 (11th Cir. July 1, 2003); American Civil Liberties Union of Ohio v. Ashbrook, 211 F.Supp.2d 873 (N.D.Ohio 2002); American Civ. Lib. Union of TN v. Rutherford Cty., 209 F.Supp.2d 799 (M.D.Tenn. 2002); American Civil Liberties Union v. Hamilton County, 202 F.Supp.2d 757 (E.D.Tenn. 2002); Freethought Soc. v. Chester County, 191 F.Supp.2d 589 (E.D.Pa. 2002), rev'd, Slip. Op. No. 02-1765 (3rd Cir. June 26, 2003); Kimbley v. Lawrence County, Ind., 119 F.Supp.2d 856 (S.D.Ind. 2000); American Civ. Liberties Union of Kentucky v. McCreary Cty., Ky., 96 F. Supp.2d 679 (E.D.Ky. 2000); Harvey, supra note 1.

29 See, e.g., Freethought Soc., supra note 28 at 595 ("We first observe that the text's first 220 words are exclusively religious."); American Civil Liberties Union of Ohio, supra note 28 at 884 (citing Stone, 449 U.S. at 41-42) ("the first part of the Commandments concerns the religious duties of believers"). See also O'Bannon, supra note 27 at 771 ("The Ten Commandments is still an inherently religious text").

30 See Edwards v. Aguillard, 482 U.S. 578, 586-87 (1987).

31 235 F.3d 292 (7th Cir. 2000).

32 Id. at 297.

33 Id. at 304.

34 Id. at 303.

35 Adland, supra note 27 at 482 (references to statements by nation's historical figures extolling religion in preamble to resolution setting up Ten Commandments display had "religious meaning," and did not evince a valid secular justification); Glassroth, supra note 28 (judge violated the Establishment Clause by placing Ten Commandments in courtroom, despite accompanying quotations by Madison, Blackstone, Washington, and Jefferson, among others).

36 American Civ. Liberties Union, supra note 28 at 689.

37 Glassroth, supra note 28 at 1300 (other governmental displays do not present same case of religious endorsement as court room Ten Commandments display).

38 Books, supra note 9 at 302.

39 Id.; ACLU Nebraska Found., supra note 27 at 1035 (monument "sends message to non-Jews and non-Christians that they are outsiders") (citation and internal quotations omitted). The fact that the monuments reference both religions, rather than one, does not inoculate them against the Establishment Clause. See County of Allegheny, supra note 10 at 615 (opinion of Blackmun, J.) ("simultaneous endorsement of Judaism and Christianity is no less constitutionally infirm than the endorsement of Christianity alone").

40 See, e.g., Books, supra note 9 at 307 (inclusion of eagle and flag specifically links religion . . . and civil government"); accord ACLU Nebraska Found., supra note 27 at 1035.

41 See, e.g., Adland, supra note 27 at 475 (enjoining move of monument to state capitol grounds); Indiana Civil Liberties Union, supra note 27 at 768 (finding monument on statehouse grounds unconstitutional); ACLU Nebraska Found., supra note 27 at 1035 (striking down monument in largest city park).

42 307 F.3d at 477.

43 Id. at 487.

44 Id. at 488.

45 In addition to the cases that follow, the Tenth Circuit upheld the constitutionality of a FOE monument in Anderson v. Salt Lake City Corp., 475 F.2d 29 (!0th Cir. 1973). That ruling, however, predated both Stone and County of Allegheny. The Tenth Circuit has since questioned the continued viability of that precedent. City of Ogden, supra note 27 at 1000 n.3. Further, a recent Eleventh Circuit decision upholding the use of the commandments' outline, along with a sword, on a county court clerk's seal used solely to authenticate documents is unlikely to have much impact on litigation concerning public displays of the Decalogue. See King v. Richmond Cty,, Georgia, 331 F.3d 1271 (11th Cir. 2003). One month later, in striking down a Ten Commandments Monument in the rotunda of the Alabama State Judicial Building, the Eleventh Circuit distinguished King on the ground that: (1) the county had a legitimate secular purpose in conveying to illiterate citizens that the seal was a symbol of law; (2) the tablets were alongside a secular symbol - the sword; (3) the tablets were of small size; and (4) the text of the commandments did not appear on the seal. Glassroth v. Moore, Slip Op. No, 01-16708 and 02-16949 at 39-41 (11th Cir. July 1, 2003).

46 Freethought Society, supra note 26.

47 See id. at 39 (Bright, J., concurring) ("crucial facts" in decision were failure to change plaque's location when court entrance moved, County had not taken action in regard to plaque for "many years," and plaque is "barely visible" from the street).

48 Suhre v. Haywood County, N.C., 55 F.Supp.2d 384 (W.D.N.C. 1999).

49 Id. at 394.

50 Freedom from Religion Found., Inc., supra note 26.

51 Id. at 1025. The court also found that FOE did not have a religious purpose in donating the monument, but had the secular goal of setting a moral code for youth. Id. at 1023-24.

52 Summum v. Callaghan, 130 F.3d 906 (10th Cir. 1997); City of Ogden, supra note 27 at 995.

53 The Eleventh Circuit, in holding a Ten Commandments display by the Chief Justice of the Alabama Supreme Court unconstitutional, noted that the Chief Justice had denied requests by an atheist group and others to place their displays in the courthouse as well. Glassroth, supra note supra note 45 at 11.

54 Harvey, supra note 1 at 671.

MCLE SELF-ASSESSMENT TEST

1. The Supreme Court in Allegheny County upheld the constitutionality of the menorah/Christmas tree display.

   ❑ True ❑ False

2. Judge Easterbrook said that the rules established by the Supreme Court for judging the legality of public displays of religious symbols were more appropriate for house painters than judges.

   ❑ True ❑ False

3. Courts have generally judged the last five commandments to carry a religious message.

   ❑ True ❑ False

4. The Chief Justice of the Mississippi Supreme Court displayed the Ten Commandments in his courtroom.

   ❑ True ❑ False

5. In Capitol Square Review, the Supreme Court considered the legality of a display set up by the Ku Klux Klan.

   ❑ True ❑ False

6. Courts considering Establishment Clause challenges employ the "Orange" test.

   ❑ True ❑ False

7. The inspiration for the FOE Ten Commandments monuments came from a juvenile court judge.

   ❑ True ❑ False

8. The FOE Ten Commandments monuments contain both Jewish and Christian symbols.

   ❑ True ❑ False

9. In Stone v. Graham, the Supreme Court invalidated a Ten Commandments display in a public park.

   ❑ True ❑ False

10. Summum has sought to place a display of its "nine principles" alongside Ten Commandments monuments.

    ❑ True ❑ False

11. The Colorado Supreme Court found an FOE monument unconstitutional.

    ❑ True ❑ False

12. The "endorsement test" was first articulated in an opinion by Justice O'Connor.

    ❑ True ❑ False

13. Only Justices Stevens and Brennan fully agreed with the holding in County of Allegheny.

    ❑ True ❑ False

14. The Third Circuit recently found the display of a Ten Commandments plaque to be constitutional.

    ❑ True ❑ False

15. The FOE monuments contain Latin letters.

    ❑ True ❑ False

16. The frieze on the Supreme Court wall includes pictures of Caesar and Napoleon.

    ❑ True ❑ False

17. The Supreme Court in Lynch found an Easter display constitutional.

    ❑ True ❑ False

18. For a display to violate the Establishment Clause, the government must intend for it to have a religious meaning.

    ❑ True ❑ False

19. In County of Allegheny, Justice Stevens discussed the constitutionality of a Ten Commandments display.

    ❑ True ❑ False

20. The only challenge to a FOE monument prior to the 1990s resulted in it being struck down.

    ❑ True ❑ False

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The Struggle for Local Control: An Update from the Coastal Frontline

By Christi Hogin, Esq.*

This is the story of a city that was robbed of its planning and zoning authority and the story of the voters' attempt to invoke the reserved power of referendum as restitution. After you finish reading the (unfinished) tale of Malibu's Local Coastal Program and attempted referendum, given the implications for democracy and separation of powers, you may want to shout "no regulation without representation" and throw tea in a harbor. At a minimum, you should realize this is a time for city attorneys and county counsels to be very alert.

I. THE BASICS

State law requires that a newly incorporated city prepare and adopt a general plan, which is a long range planning document.[1] The California Supreme Court has dubbed the general plan a "constitution for all future development."[2] In addition, coastal cities[3] are required by the Coastal Act[4] to prepare a local coastal program ("LCP") that implements the State's coastal policies.[5] Public Resources Code Section 30108.6 defines an LCP as follows:

> "a local government's (a) land use plans, (b) zoning ordinances, (c) zoning district maps, and (d) within sensitive coastal resource areas, other implementing actions, which, when taken together, meet the requirements of, and implement the provisions and policies of [the Coastal Act] at the local level."

Ordinarily, a coastal city prepares its general plan and zoning ordinances in a manner that implements the State's coastal policies. The coastal city's plans and ordinances ultimately are presented as an LCP to the Coastal Commission[6], which reviews the LCP to "certify" consistency with the Coastal Act.

Nearly all development in the coastal zone (defined by the Coastal Act) requires a coastal development permit. Until a coastal city has a certified LCP, the Coastal Commission issues coastal development permits for that community. Once an LCP is certified, coastal development permits are issued by the coastal city instead of the Coastal Commission.

Many coastal cities do not have a certified LCP, although all are supposed to.

II. MALIBU'S LCP PREPARATION

The City of Malibu lies entirely within the coastal zone and is subject to the Coastal Act. When Malibu incorporated in 1991, a task force was established to draft the city's general plan. The task force held numerous public meetings and ultimately prepared a draft document that was submitted to the city council. The general plan took into account Coastal Act policies (it was well-understood that the document would one day be part of the city's LCP). The task force spent four years completing the draft and the city council held 56 public meetings over an 18 month period before approving the general plan. In all candor, by that time, the city had fallen a bit behind schedule. Democracy can be sluggish.

Malibu then went to work assembling an LCP. The city council appointed an advisory committee, much like it had done with the general plan. The committee took a few years, holding over 110 public meetings, to prepare a draft. Ultimately a full draft was completed and in March 2000 city staff sent it to the Coastal Commission for review. All the while, the Coastal Commission continued to issue coastal development permits in Malibu, as it does in many other communities.

III. AB 988 REMOVES LOCAL CONTROL

Unbeknownst to Malibu, within weeks of its LCP submission, the Coastal Commission's chair, executive director and lobbyist (yes, the Commission has a lobbyist) were working with the appointing authorities to craft legislation to transfer land use planning authority from the city to the Commission.

In August 2000, after floating various ideas (like withholding all State money from Malibu), the Speaker of the Assembly gutted a previously introduced bill (AB 988) and inserted language empowering the Coastal Commission to draft Malibu's LCP. The newly revised bill virtually sailed through the Legislature pushed along by a whisper campaign alleging that Malibu pollutes the ocean with its seaside septic systems, refuses to allow any public access to the beach, and refuses to comply with the Coastal Act. Oblivious to these machinations, Malibu had no representatives there to correct the record.

The Coastal Commission interpreted AB 988 (codified at Public Resources Code Section 30166.5) as conferring it with plenary authority to adopt an LCP for Malibu. Instead of relying on the city's land use plans, zoning ordinance and zoning district maps (as arguably required by the Coastal Act), the Coastal Commission constructed its own LCP and declared it paramount. The Coastal Commission's LCP was adopted (over Malibu's objections) on September 13, 2002.

IV. MALIBU VOTERS REACT

Resisting disenfranchisement, Malibu voters circulated a referendum petition. Within 30 days of the Coastal Commission's adoption of the LCP, the petition had been signed by nearly a third of the city's registered voters and was presented to the city clerk. The Los Angeles County Registrar of Voters has determined that the petition has sufficient signatures to qualify for the ballot. Under Elections Code Section 9237, a legislative act is "suspended" and not in effect once a valid referendum petition is filed with the city clerk.

A municipality's duties under the Elections Code with respect to voter referendum petitions are ministerial. The municipality does not have the discretion to reject out-of-hand the voter's referendum (such authority would undermine the power of referendum that the people reserved for themselves in the constitution, which power is jealously guarded by the courts).[7] If the Malibu City Council had adopted that LCP, the law is clear that it would be subject to referendum.[8] But the Coastal Commission, not the city, adopted the LCP. This novel circumstance led the city to court.

Malibu filed a lawsuit contending that, under Elections Code Section 9237, the effectiveness of the Coastal Commission's LCP is suspended by operation of law pending the referendum election. The city's theory is that the referendum power reserved by the people can be invoked against any legislative act regardless of what body is exercising legislative authority over the electorate.[9]

The Coastal Commission contends that, since it is an administrative body of the State, its actions are administrative and therefore are not subject to referendum. The Coastal Commission also takes the position that Malibu violates the Coastal Act by not ignoring the referendum petition and issuing coastal development permits in accordance

with the LCP. This argument is based on AB 988, which purports to require the city to assume permitting authority upon the Coastal Commission's adoption of the LCP.

V. SUPERIOR COURT RULES IN FAVOR OF COASTAL COMMISSION

In a 40-page, single spaced decision, the Superior Court held that the Malibu voters have no right to a referendum on the Coastal Commission's LCP. The court reasoned that, by enacting AB 988, the Legislature decided that the Coastal Commission should adopt the LCP for the Malibu community, even if that means re-zoning and changing the city's general plan. The heart of the court's lengthy opinion is that the lofty environmental goals of the Coastal Act justify any incidental restriction of local power.

Malibu has appealed.

VI. ANTI-LOCALISM THREATENS FUNDAMENTAL PRINCIPLES

The complexities of modern administrative bureaucracy have caused administrative agencies to evolve into curious hybrids. To deal with problems inherent in contemporary society, administrative bodies are now routinely delegated substantial quasi-legislative and quasi-adjudicative powers. And, although this expansion of executive authority initially caused great concern among the courts, these types of agencies have become a fact of modern government.[10] However, even though the lines separating the three branches of government have been allowed to shift somewhat in the interests of functionality and efficiency, they are not infinitely malleable. On the contrary, the law is settled that there is a point certain that cannot be crossed without flying in the face of fundamental constitutional principles of separation of powers.[11]

The doctrine of separation of powers does not require proof that the commingling of powers is resulting in the corruption of government or an intrusion on individual liberties. The framers of the federal and state constitutions were fully aware of the implications of commingling powers. The doctrine of separation of powers seeks proactively to insure the absence of an environment conducive to corruption and intrusion on individual liberties. As James Madison noted: "It will not be denied, that power is of an encroaching nature, and that it ought to be effectively restrained from passing the limits assigned to it."[12]

The authority extended by the Legislature to its appointees on the Coastal Commission through AB 988 is the authority to draft local law. The Coastal Commission wrote laws for Malibu with little or no regard for the city's right of self-governance and its desire to be centrally involved with shaping the law that it enforces. The Coastal Commission's legislation ostensibly is to be the law of Malibu and the rights, duties and obligations of all those residing in, doing business in, or even passing through the city will be affected (and in some instances profoundly so) thereby.[13]

VII. COASTAL COMMISSION TARGETS OTHER COASTAL CITIES

At its June 2, 2003 meeting, the Coastal Commission adopted a resolution requesting that Public Resources Code Section 30515 be amended to grant it additional power over coastal cities. Specifically, the Coastal Commission seeks authority to require coastal cities to revise their LCPs, as well as authority to revise the LCPs unilaterally in the event of a refusal.[14]

This idea is not new. Last year Assembly Bill 640 proposed similar broad powers, but it was shelved when it met resistance.

VIII. A CALL FOR RENEWED PARTNERSHIP

The Coastal Act is designed to be an alliance between coastal cities and the State to implement statewide coastal policy. The Act declares that "to achieve maximum responsiveness to local conditions, accountability, and public accessibility, it is necessary to rely heavily on local government and local land use planning procedures and enforcement" in carrying out the State's coastal objectives and policies.[15] Public Resources Code Section 30512.2 specifically admonishes the Coastal Commission to allow local governments to choose the methods of implementing Coastal Act policies:

> "(a) The commission's review of a land use plan shall be limited to its administrative determination that the land use plan submitted by the local government does, or does not, conform with the requirements of Chapter 3 (commencing with Section 30200). In making this review, the commission is not authorized by any provision of this division to diminish or abridge the authority of a local government to adopt and establish, by ordinance, the precise content of its land use plan.
>
> (b) The commission shall require conformance with the policies and requirements of Chapter 3 (commencing with Section 30200) only to the extent necessary to achieve the basic state goals specified in Section 30001.5."

As a practical matter, in order for the Coastal Act to work, local governments must be involved in and satisfied with the LCP preparation process.[16] At least in the case of Malibu, the Legislature was willing to compromise local control in favor of

consolidating power in the hands of its statewide commission. In doing so, of course, the balance embedded in the Coastal Act was all but lost. Preservation of local control depends on the restoration of that balance.

The LCP imposed on Malibu has led to a voter revolt, litigation and a stand-off between two governmental agencies. All predictable results from a process that devalues local government's role in formulating the precise plan to implement State coastal policy. Nevertheless, the Coastal Commission has asked the Legislature to authorize it to draft local law throughout the coastal zone. Tsunami alert.

ENDNOTES

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1 Govt.C. § 65300.

2 Lesher Communications, Inc. v. City of Walnut Creek, 52 Cal.3d 531, 540 (1990); Citizens of Goleta Valley v. Board of Supervisors, 52 Cal. 3d 553, 570 (1990). Both cases find that the general plan is the single most important planning document.

3 For convenience (mine), throughout the paper I use the term "coastal city" although the Coastal Act applies equally to counties.

4 Pub.Res.C. § 30000 et seq.

5 Id. § 30200.

6 The Coastal Commission consists of 12 members. Four are appointed by the Governor, four are appointed by the Speaker of the Assembly and four are appointed by the President of the Senate Rules Committee. Pub.Res.C. §§ 30300-01. Until recently, all served at the pleasure of the appointing authority. However, after the Court of Appeal held that the appointment structure violated separation of powers (because a majority of members of the executive branch commission were controlled by the legislative branch), the Coastal Act was amended to provide for fixed terms for those members appointed by the Legislature. The case challenging the constitutionality of the Coastal Commission's appointment scheme is now pending in the California Supreme Court. See Marine Forests v. California Coastal Commission, 132 Cal.Rptr.2d 527 (2003).

7 Cf. Alliance for a Better Downtown Millbrae v. Wade, 108 Cal.App.4th 123 (2003) (holding that elections official can not refuse to certify initiative petition based on extrinsic evidence relating to manner of petition circulation).

8 See Yost v. Thomas, 36 Cal. 3d 561 (1984).

9 Legislative acts are subject to referendum. See Midway Orchards v. County of Butte, 220 Cal.App.3d 765 (1990) (holding that the Elections Code provisions relating to referenda must be read to include all legislative acts in order to protect the people's constitutional right of referendum). Adoption of a local coastal program is a legislative act. Yost, supra note 8 (holding that Coastal Act's LCP requirement did not abrogate the power of referendum). See also San Mateo County Coastal Landowners' Assn. v. County of San Mateo, 38 Cal.App.4th 523 (1995) (validating an initiative amending the county's local coastal program); DeVita v. County of Napa, 9 Cal.4th 763 (1995) (land use plan of county general plan may be amended by initiative); Citizens for Jobs and the Economy v. County of Orange, 94 Cal.App.4th 1311 (2002) (reiterating holding that LCP amendments were "analogous to general plan amendments as local legislative acts subject to initiative and that local governments have broad discretion to determine the content of their land-use plans.").

10 Bixby v. Pierno 4 Cal.3d 130, 142 (1971); Gaylord v. City of Pasadena, 175 Cal. 433, 436 (1917).

11 See, e.g., In re McLain, 190 Cal. 376, 379 (1923); People's etc. L. Assn. v. Franchise Tax Bd., 110 Cal.App.2d 696, 700 (1952).

12 The Federalist No. 48 (James Madison), The Federalist Papers, E.H. Scott ed. at 273.

13 I cannot resist offering the reader a sampling of provisions in the 500 pages of rules and regulations the Coastal Commission imposed on Malibu: (1) service station buzzers can not generate noise beyond that of a normal residential telephone ring; (2) entrances for ATM drive-up lanes must be 25 feet from driveways entering public streets; (3) parcels used for a community theater must be at least 5 acres; (4) outdoor performances are prohibited everywhere in the city; (4) greenhouses are prohibited on a lot smaller than one acre; (5) no more than eight animals per acre on a property, four of which may be horses and the remainder of which may be any combination of cattle, sheep and/or goats; (6) bowling alleys must provide at least five parking spaces per lane.

14 The staff report and the accompanying resolution can be found on the Coastal Commission's website at http://www.coastal.ca.gov/lcp/th15-6-2003.pdf.

15 Pub.Res.C. § 30004.

16 See also Yost, supra note 8 (the precise content of a local coastal program remains within the sound discretion of the local government).

Miranda: Observations on the Rule Forty Years Later

By D. Craig Fox, Esq.*

It was on March 13, 1963 that Ernesto Miranda was arrested at his home for rape and robbery by Phoenix police, taken to "Interrogation Room No. 2" and questioned. Two hours later, the officers had Miranda's confession, together with a signed statement attesting that it had been made voluntarily, without threats and with full knowledge that it could be used against him. Miranda was never advised of his right to consult with an attorney or to have one present during the interrogation.

Miranda v. Arizona[1] still makes surprisingly good reading nearly forty years after it was decided by the Supreme Court. The Court's opinion includes descriptions of police interrogation techniques that were common in the early half of the last century and are now considered clichés.[2] The opinion also contains numerous historical references, including one to the infamous inquisitional "Court of the Star Chamber" used to compel confessions in seventeenth century England.

Writing for the Court, Chief Justice Warren concluded that any time an individual is deprived of freedom by government authorities in a significant way and subjected to questioning, the privilege against self-incrimination is jeopardized and procedural safeguards are necessary. Those safeguards require that a suspect be notified of the following prior to questioning: that he or she has the right to remain silent; that anything he or she says can be used against him or her in court; that he or she has the right to the presence of an attorney during questioning; and that, if an attorney cannot be afforded, one will be appointed. Unless the prosecution demonstrates that this admonition was given and a competent waiver was made, no evidence obtained as a result of the interrogation may be used against the individual in a criminal trial.

One would think that the Miranda admonition would be easily understood and applied. However, as with many simply stated rules of law and procedure, it has seen a number of twists and turns as it has been interpreted in subsequent cases. This phenomenon is starkly illustrated by a comparison of the Supreme Court's recent decision in Chavez v. Martinez[3] and the California Supreme Court's recent decision in People v. Neal.[4]

I. CHAVEZ V. MARTINEZ

On November 28, 1997, Oxnard Police Officers Pena and Salinas were conducting a narcotics investigation when they heard a bicycle approaching on a dark path nearby. The rider, Oliverio Martinez, dismounted and placed his hands behind his head at their command. Officer Salinas conducted a pat-down frisk and discovered a knife in Martinez' waistband. Although the specific facts are disputed, what followed was a tragic series of events. According to the officers, when the knife was found, Martinez began to run. A scuffle between all three ensued. All parties agree that, at one point, Officer Salinas yelled "he's got my gun!" Officer Pena then drew her firearm and shot Martinez in the head and torso, leaving him blinded and paralyzed.

Patrol Supervisor Ben Chavez soon arrived and accompanied Martinez to the hospital where he questioned Martinez over a forty-five minute period, interrupted only to permit emergency medical treatment. During the interview, Martinez repeatedly stated "I am dying" and "I am choking." Martinez later admitted taking the gun from Salinas' holster and pointing it at the officers. He also confessed to being a regular heroin user. At no point during the interview was Martinez given the Miranda admonition. Martinez was never charged with a crime, and his answers were never used against him in a prosecution.

Thereafter, Martinez filed a civil action under 42 U.S.C. Section 1983 contending that Chavez' actions violated his Fifth Amendment right against self-incrimination and his Fourteenth Amendment substantive due process right to be free from coercive questioning. The district court granted summary judgment to Martinez with respect to Chavez' qualified immunity defense on both claims, and the Ninth Circuit Court of Appeals affirmed. Notably, the Ninth Circuit held that a police officer violates these constitutional rights by obtaining a confession through coercive conduct whether or not the incriminating statement is subsequently used in a criminal proceeding.

The Supreme Court reversed, finding that the deliberate violation of Miranda did not constitute a basis for civil rights liability. Justice Thomas' plurality opinion reasoned that the Fifth Amendment does not prohibit coercive questioning when the answers will not be used in a criminal proceeding. Thus, because Martinez was never prosecuted for a crime, or compelled to be a witness against himself in a criminal trial, no violation of the Fifth Amendment occurred. Justice Thomas also stressed that coercive questioning commonly occurs and is judicially sanctioned. For example, a public employee may lose his or her employment upon a refusal to answer potentially incriminating questions concerning official duties if the employee is advised that the answers may not be used against him or her in a criminal proceeding.

The plurality then distinguished constitutional rights and "judicially crafted prophylactic rules" designed to safeguard those rights. Here, the Miranda exclusionary rule is such a prophylactic rule. Because Miranda's admonition is not expressly required by the Fifth Amendment, but rather arises as a result of judicial measures to protect that right, the plurality held that a failure to provide it does not violate a person's constitutional rights and therefore cannot be grounds for a Section 1983 action.

The Supreme Court remanded the case to permit Martinez to pursue his substantive due process claim. However, a plurality held that the coercive questioning of Martinez was not so offensive as to "shock the conscience" and thereby violate due process. The plurality cautioned that this conclusion might be different had Chavez acted with intent to harm Martinez or aggravate his injuries. In their view, though, the questioning arguably was justified based upon the possibility that Martinez might die and take with him evidence of possible police misconduct.

II. PEOPLE V. NEAL

On April 3, 1999, eighteen year-old Kenneth Ray Neal, a high school dropout, shared an apartment with sixty-nine year-old Donald Collins in a seniors complex in Springville. The two had become friends years earlier when Collins was an employee and Neal was a resident at a group home for boys in Porterville.

That evening, Neal strangled Collins from behind, an act apparently precipitated by

an argument over what television program to watch. After the murder, Neal attempted to remove fingerprints from the apartment and wrote a note to focus guilt on Jon Adkins who previously had lived with Collins.

The day after the murder Neal arranged to "discover" Collins, in the company of a mutual friend, to further deflect suspicion. Shortly thereafter, Tulare County Sheriff's Detective Mario Martin interviewed Neal over a two-day period. In the first interview, Neal provided Detective Martin with general background information about himself, his first meeting with Collins and their friendship, and also about Jon Adkins, "the only person he could think of who might have killed Collins." Detective Martin asked Neal about some apparently fresh marks on Neal's hands, which caused Neal to become defensive. Detective Martin then left the room for approximately fifteen minutes. When the officer returned, Neal immediately stated that he was ready to leave. Instead of allowing Neal to leave, Detective Martin gave him the Miranda admonition and continued questioning him concerning the marks on his hands. Neal never waived his rights and, when the officer accused him of lying about the murder, he stated that he was ready to talk with his lawyer and that he wished to remain silent. Detective Martin nevertheless continued to interrogate Neal and ignored nine requests for an attorney.

Detective Martin then placed Neal under arrest for the murder of Collins. Next, in a move that the California Supreme Court found significant, the officer made a promise and a threat to Neal. Detective Martin offered to make it better for Neal if he would "try and cooperate;" otherwise, warned Martin, "the system is going to stick it to you as hard as they can" and the charge would be "first degree murder or whatever." Neal said he would think about it, the interview was terminated and he was placed in a cell without a toilet or a sink. He was not given food or water until the next morning, and at no time was he provided access to counsel or anyone else.

The following day, Neal requested to speak with Detective Martin who again provided the Miranda admonition. As the interview continued, Neal confessed to the murder and to attempting to conceal the crime. Later in the day, Detective Martin conducted a third interview after repeating the Miranda admonition. Neal confessed yet again.

During trial, Detective Martin admitted deliberately violating Miranda when he continued to question Neal. The officer stated that this interrogation technique was taught by a supervisor, and that he believed Neal's statements could be used for impeachment purposes despite the impropriety.

As framed by the California Supreme Court, the issues were whether Neal voluntarily initiated further contact with Detective Martin on the day following the initial interview and whether Neal voluntarily made the two confessions that followed. In a unanimous decision, the court held that the initiation and the confessions were involuntary. This conclusion was based on three factors: Detective Martin's deliberate violations of Miranda; Neal's youth, inexperience and low intelligence, combined with his immediate confinement overnight without a sink, toilet, food or water; and, finally, the "threat and promise" made by the officer.

III. A WIDENING GULF?

Whether the Miranda admonition is viewed simply as a "prophylactic rule" or as a necessary component of the Fifth Amendment, the Chavez and Neal cases highlight a gulf between the Supreme Court and the California Supreme Court as to its importance. It remains to be seen whether this gulf will widen.

Next term, the Supreme Court will hear three Miranda-related cases. In Fellers v. United States, the Court will address whether second statements, preceded by the admonition, should have been suppressed "as fruits of an illegal post-indictment interview conducted without the presence of counsel."[5] In United States v. Patane, the Court will resolve whether a failure to give the admonition requires the suppression of physical evidence obtained as a result of the suspect's "unwarned" but voluntary statement.[6] Lastly, in State of Missouri v. Seibert, the Court will consider whether the intentional failure to give the admonition to a suspect before he confesses to murder, during a routine and "uncoercive" police interrogation, prevents the suspect from effectively waiving his rights and again confessing after it is given minutes later.[7]

Ultimately, police policies that encourage deliberate violations of Miranda do nothing to enhance the image of the modern law enforcement officer. While deliberate disregard of the admonition may result in the apprehension of more criminal suspects, the counter effect will likely be the suppression of evidence, fewer convictions of the guilty and undermining of respect for the criminal justice system.

ENDNOTES

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1 384 U.S. 436 (1966).

2 One example is the "Mutt and Jeff" technique (also known as "good cop, bad cop"). Another example is the "reverse lineup" where fictitious witnesses falsely identify the suspect.

3 123 S.Ct. 1994 (2003).

4 31 Cal.4th 63 (2003).

5 No. 02-6320, U. S. Court of Appeals, 8th Cir.

6 No. 02-1183, U. S. Court of Appeals, 10th Cir.

7 No. 02-1371, Supreme Court of Missouri.

Adjusting Municipal Debts: Chapter 9

By David S. Kupetz, Esq.*

I. INTRODUCTION

Chapter 9 of the Bankruptcy Code[1] provides a mechanism for eligible governmental entities to restructure debt. Chapter 9 is designed to enable a financially distressed municipality to continue providing essential services to residents while working out a plan to adjust its debts. However, "[m]unicipal bankruptcy is quite unlike bankruptcy for individuals or private corporations."[2] In fact, application of the term "bankruptcy" to Chapter 9 is a misnomer since Chapter 9 is designed as a way to allow financially distressed municipalities to continue in existence.

The primary differences between a Chapter 9 and Chapter 11 bankruptcy are the result of the constitutional mandate of the Tenth Amendment guaranteeing state sovereignty.[3] Congress has the power to establish uniform laws on the subject of bankruptcies throughout the United States.[4] Moreover, the Constitution prohibits the states from passing any law that impairs the obligation of contracts.[5] Accordingly, "[o]nly federal law can give the type of relief afforded by chapter 9."[6]

II. ELIGIBILITY

Access to protection under Chapter 9 is limited to entities that satisfy the requirements of Section 109(c). First, only a "municipality" is eligible.[7] The Code defines "municipality" as a political subdivision, public agency, or instrumentality of a state,[8] but it does not define these terms. Courts have held that a public agency or authority is a municipality for purposes of Section 109(c)(1) if it is subject to control by public authority, state or municipal.[9]

Second, a municipality's access to Chapter 9 protection is conditioned upon specific state authorization.[10] If the debtor is specifically authorized, in its capacity as a municipality or by name, to seek relief under Chapter 9, the lack of authorization from any entity empowered to grant it does not effect any specific authorization that exists otherwise under state law.[11]

Third, a municipality must be "insolvent" in order to be eligible for Chapter 9 relief.[12] For most bankruptcy purposes, insolvency is a balance sheet test. However, insolvency of a municipality instead has the following meaning:

> "[I]nsolvent" means . . . with reference to a municipality, financial condition such that the municipality is (i) generally not paying its debts as they become due unless such debts are the subject of a bona fide dispute; or (ii) unable to pay its debts as they become due.[13]

The reference point of the analysis is the filing date of the Chapter 9 petition. Thus, if at the time of the commencement of a Chapter 9 case a municipality is generally not paying its undisputed debts as they become due, the insolvency requirement is satisfied. Alternatively, the determination of whether a municipality is "unable to pay" requires a prospective analysis. Courts have rejected the argument that, in order to satisfy the requirement that it is insolvent because it is "unable to pay its debts," a municipality must demonstrate that it is unable to raise the revenues required to meet its obligations through taxation, rate increases, or other efforts.[14]

Fourth, a municipality must desire to effect a plan to adjust its debts.[15] It has been held that a municipality may satisfy this requirement even if it is "unwilling, at least at this [early] juncture, to adopt a flexible approach or agree to any compromise concerning the provisions of that plan."[16] In any event, a municipality would not be able to file a Chapter 9 petition in good faith if it lacked the desire to effect a plan to adjust its debts.[17]

In order to be eligible for relief under Chapter 9, an insolvent municipality specifically authorized to file a Chapter 9 petition must do more than desire to effect a plan to adjust its debts. Section 109(c)(5) provides four alternative methods of satisfying the final requirement for Chapter 9 eligibility. The first alternative is fulfilled if the municipality has obtained the agreement of creditors holding at least a majority in amount of the claims of each class that such entity intends to impair under a plan in the Chapter 9 case.[18] Because obtaining a sufficient and satisfactory prepetition agreement is unlikely in most circumstances, municipalities generally meet the requirement of subsection (c)(5) by one of the other options.

The second alternative for satisfying Section 109(c)(5) requires that the municipal debtor has negotiated in good faith with creditors and has failed to obtain the agreement of creditors holding at least a majority in amount of the claims of each class that such entity intends to impair under a plan.[19] In instances where serious negotiations occurred prepetition between the municipal debtor and creditors holding sufficient debt, courts have found the municipality to have satisfied the requirement.[20] Other courts have held that where the municipal debtor failed to engage in serious prepetition negotiations regarding a feasible payment plan, it failed to satisfy the requirement.[21]

The third alternative for satisfying Section 109(c)(5) is met if the municipal debtor is unable to negotiate with creditors because such negotiation is impracticable.[22] Impracticability may be viewed as a matter of degree. At some point, the sheer number of creditors involved or, among other possibilities, severe time constraints facing a municipal debtor, may make negotiation impracticable.

Finally, a municipal debtor satisfies Section 109(c)(5) if the debtor reasonably believes that a creditor may attempt to obtain a preferential transfer that is avoidable under Section 547.[23] In order to fulfill this final option, the debtor should demonstrate the reasonableness of its belief that the creditor may attempt to obtain a transfer and its belief that such a transfer is avoidable under Section 547.

III. LIMITATION ON JURISDICTION AND POWERS OF COURT

The reconciliation under Chapter 9 of the constitutional requirements guaranteeing state sovereignty and prohibiting impairment of the obligation of contracts by the states is explicitly embodied in Sections 903 and 904 of the Code. Municipalities are political subdivisions of states from which they derive all of their rights and powers. Chapter 9 does not disturb that arrangement. That is, it does not give a city rights and powers independent of the state. Section 903 reaffirms the constitutional requirement that Chapter 9 not limit or impair state control over the state's subdivisions, agencies, and instrumentalities so that there is no interference with such control. In addition, Section 903(1) and (2) specifically implement the constitutional prohibition against impairment of the obligations of contracts by the states by providing that state composition procedures may not bind nonconsenting creditors. Section 904 prevents the court from interfering with the political or governmental powers of the municipality, any of the property or revenues of the debtor, and the municipality's use and enjoyment of any income producing property.

The severe limitations on the powers and jurisdiction of the court in a Chapter 9 case, as compared to cases under other chapters of the Code, is designed to preserve the constitutionality of Chapter 9. Section 904 provides an exception to its limitation on jurisdiction and powers of the court if the debtor consents or the plan so provides. This actually is a single exception since in a Chapter 9 case only the debtor may propose a plan. Without the consent of the debtor, the only real power and control that the court has over a Chapter 9 debtor is the power to reject confirmation of the plan if the requirements of Section 943 are not satisfied and/or the power to dismiss the case.

IV. PLAN FOR ADJUSTMENT OF DEBTS

A. *Filing of Plan*

Eligibility for relief under Chapter 9 is conditioned upon, among other things, a municipality's desire to effect a plan to adjust its debts.[24] Section 941 mandates that the debtor demonstrate this desire by filing a plan. The Code does not set a deadline for the filing of a plan under Chapter 9. Rather, Section 941 provides that if a plan is not filed with the petition, the debtor shall file a plan at such later time as the court fixes. However, unlike the situation in Chapter 11, only the debtor can file a plan in a Chapter 9 case. Ultimately, if the debtor fails to file a plan within a reasonable period of time, the court may dismiss the case.

B. *Confirmation Requirements*

1. GENERAL OVERVIEW

Section 943(b) contains the standards for confirmation of a plan under Chapter 9. These requirements are discussed below. The court must confirm a plan if all of the requirements are satisfied.

2. COMPLIANCE WITH APPLICABLE PROVISIONS OF THE CODE

Section 943(b)(1) requires as the first condition to confirmation of a Chapter 9 plan that the plan comply with the provisions of the Code made applicable by Sections 103(e) and 901(a). Section 103(e) announces the general rule that, except as otherwise provided in Section 901, only the provisions of Chapters 1 and 9 apply in Chapter 9 cases. Section 901 incorporates into Chapter 9 many of the requirements for confirmation of a plan of reorganization under Chapter 11. The most significant of these requirements are set forth in Sections 1122 (classification of claims), 1123 (contents of plan), and 1129 (confirmation of plan), to the extent made applicable in Chapter 9 cases under the Code.

3. DISCLOSURE AND DETERMINATION OF REASONABLENESS OF FEES AND EXPENSES AND PAYMENT OF ADMINISTRATIVE PRIORITY CLAIMS

Section 943(b)(3) provides as a condition to confirmation of a Chapter 9 plan that all amounts to be paid by the debtor or by any person for services or expenses in the case or incident to the plan have been fully disclosed and are reasonable. In Chapter 11 cases, the court independently reviews and approves the fees of professionals employed in the case who are being compensated from the estate. By contrast, in Chapter 9 cases, prior to considering confirmation of a plan, the court does not engage in any such independent review and only considers the fees and expenses of professionals involved in the case as a condition to confirmation. Section 943(b)(3) works in conjunction with Section 943(b)(5), which provides that allowed administrative claims must be paid in full on the effective date of the plan unless the holder of the claim agrees to different treatment.

4. NOT PROHIBITED BY LAW

Section 943(b)(4) provides that as a condition of confirmation the debtor must not be prohibited by law from taking any action necessary to carry out the plan. Generally the "law" to be considered under this provision will be state law. However, the language is not limited to state law. Courts have held that Section 943(b)(4) does not restrict municipal debtors from proposing plans that impair the rights of bondholders even if such rights could not be impaired under state law if the municipal debtor had not resorted to relief under Chapter 9.[25]

5. REGULATORY OR ELECTORAL APPROVAL NECESSARY UNDER APPLICABLE NONBANKRUPTCY LAW

Section 943(b)(6) requires obtainment of any regulatory or electoral approval necessary under nonbankruptcy law for carrying out any provision of the plan. Alternatively, the plan provision is expressly conditioned on such approval. The legislative history of Section 943(b)(6) states that "[t]hese regulatory approvals are not limited to rates, but extend often to such other matters as the acquisition or disposition of property or the incurring of indebtedness."[26]

6. BEST INTERESTS OF CREDITORS AND FEASIBILITY TESTS

The final conditions for confirmation of a Chapter 9 plan require satisfaction of the best interests of creditors and feasibility tests.[27] Under Chapter 11, the best interest of creditors test is designed to measure whether creditors will receive under a plan at least as much as would be received in a liquidation

under chapter 7 of the Code. However, the best interests of creditors test in the context of a Chapter 9 case does not compare treatment under the plan to a liquidation, but rather to other realistic alternatives to the plan. "Section 943(b)(7) [with respect to the best interest of creditors provision] . . . simply requires the Court to make a determination of whether or not the plan as proposed is better than the alternatives."[28] Moreover, the debtor need not necessarily utilize all of its assets or resort to its taxing powers in order to satisfy the best interest of creditors test.[29] Sometimes the court might find that the best alternative to confirmation of a plan of adjustment that is unconfirmable is the presentation of a modified plan as opposed to dismissal of the case, which would result in parties resorting to their state law remedies.[30]

In order to satisfy the feasibility test, the debtor must show that it can meet its obligations under the plan and still maintain its operations at a level satisfactory to the debtor. The court should simply review whether the evidence submitted by the debtor shows that the debtor can perform its obligations under the plan. In Chapter 11, the feasibility test is set forth in Section 1129(a)(11). That statute requires as a condition of the confirmation that the court find that confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan. Obviously, liquidation is not a possible result for a municipal debtor. However, the general feasibility standard in the Chapter 11 context should provide guidance in Chapter 9 cases. This feasibility standard is whether the plan offers a reasonable assurance of success. Success need not be guaranteed, but the plan must have a reasonable likelihood of viability and must be more than a mere visionary scheme.

C. *Effect of Confirmation*

Confirmation of a plan for adjustment of debts is generally the goal of a Chapter 9 case. Section 944 provides that a confirmed Chapter 9 plan binds the municipal debtor and any creditor regardless of whether the creditor has participated in the Chapter 9 case in any way. Confirmation of a Chapter 9 plan allows for complete adjustment of a municipal debtor's obligations. New obligations arise under the plan and pre-confirmation obligations are discharged in accordance with the plan, the order confirming the plan, and Section 944(b).

It has been held that the discharge granted under Section 944(b) is broader than the discharge provisions in other chapters of the Code. In In re Nebraska Sec. Bank v. Sanitary & Imp. Dist. No. 7, the court stated:

> "In contrast to other discharge provisions in the Bankruptcy Code, this section does not require creditors to have a reasonable opportunity to file timely proofs of claim prior to confirmation. The only limitation on discharge in Chapter 9 is for those obligations owed to creditors who did not have notice or actual knowledge of the case before confirmation."[31]

Due process requirements are satisfied and the discharge under a Chapter 9 plan is effective as long as the claimant had an opportunity to participate in the Chapter 9 prior to confirmation of the plan.

VI. CONCLUSION

The success of a Chapter 9 case, to a greater extent than in a case under any of the other chapters of the Code, relies upon the debtor's desire to effect a plan to adjust its debts and the debtor's willingness to work with its creditors to achieve this goal. The control and power of the court and creditors in a Chapter 9 case are severely restricted when compared to the options available in a Chapter 11 reorganization. As a result, the risks imposed on a municipality by the Code when it enters Chapter 9 are minimal. The real dangers facing a municipality entering Chapter 9 are potential damage to reputation, bond ratings and public confidence. Nonetheless, it is only under Chapter 9 that an eligible municipality can obtain some breathing space from debt collection efforts and the right, if the requirements of Chapter 9 are satisfied, to adjust its debts even if it is unable to obtain the consent of all affected creditors.

ENDNOTES

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1 The Bankruptcy Code (the "Code") is found at 11 U.S.C. § 101 et seq. Unless otherwise specifically stated, all Section references in this article are to the Code.

2 In re Sullivan County Regional Refuse Disposal Dist., 165 B.R. 60, 82 (Bankr. D.N.H. 1994); H.R. REP. NO. 95-595, 95th Cong., 1st Sess. 262 (1977) ("There are major differences [under Chapter 9] from general reorganization law: first, the law must be sensitive to the issue of sovereignty of the States; second, a municipality is generally not a business enterprise operating for a profit, and there are no stockholders. These differences dictate some limitations on the court's powers in dealing with a municipal debt adjustment, and some modifications of the standards governing the proposal and confirmation of a plan.").

3 See U.S. Const. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

4 Id. art. I, § 8, cl. 4.

5 Id. art. I, § 10.

6 In re City of Bridgeport, 128 B.R. 688, 694 (Bankr. D. Conn. 1991).

7 11 U.S.C. § 109(c)(1).

8 Id. § 101(40).

9 In re Greane County Hosp., 59 B.R. 388, 389 (S.D. Miss. 1986).

10 11 U.S.C. § 109(c)(2) (as amended by § 402 of the 1994 Bankruptcy Amendments).

11 See In re City of Bridgeport, supra note 6 at 693, interpreting the "general authorization" language of 11 U.S.C. § 109(c)(2) prior to the 1994 Bankruptcy Amendments. The lack of affirmative, specific authorization will now serve as a barrier to municipalities obtaining protection under Chapter 9. The State

of California has given express statutory consent for its agencies and instrumentalities to obtain protection under federal bankruptcy (debt adjustment) law. See Cal. Gov.C. § 53760.

12 11 U.S.C. § 109(c)(3).

13 Id. § 101(32)(C).

14 See, e.g., In re Sullivan County Regional Refuse Disposal District, 165 B.R. at 76.

15 11 U.S.C. § 109(c)(4).

16 In re Ellicott Sch. Bldg. Auth., 150 B.R. 261, 265 (Bankr. D. Colo. 1992).

17 See 11 U.S.C. § 921(c).

18 Id. § 109(c)(5)(A).

19 Id. § 109(c)(5)(B).

20 See Pleasant View Utility District of Cheatam County, 24 B.R. 632, 639 (Bankr. M.D. Tenn. 1982).

21 In In re Sullivan County Regional Refuse Disposal District, supra note 1 at 77, the court found that the municipal debtor had evaded "any serious attempt to come up with a feasible repayment plan until [shortly before the Chapter 9] filing, and then only with a half-hearted effort."

22 11 U.S.C. § 109(c)(5)(C). The Code does not define what it means for negotiations to be "impracticable."

23 Id. § 109(c)(5)(D). See Section 101(54) for a definition of "transfer."

24 Id. § 109(c)(4).

25 See In re City of Columbia Falls Special Improvement Dist. Nos. 25, 26, and 28, 143 B.R. 750, 760 (Bankr. D. Mont. 1992).

26 H.R. REP. NO. 1011, 100th Cong., 2d Sess. 9 (1988), reprinted in 1988 U.S.C.C.A.N. 4115, 4123.

27 11 U.S.C. § 943(b)(7).

28 Hollstein v. Sanitary & Improvement Dist. No. 7, 98 B.R. 970, 974 (Bankr. D. Neb. 1989) ("In re Sanitary & Improvement Dist. No. 7").

29 Id. at 974. However, see Fano v. Newport Heights Irrigation District, where in a Chapter 9 case under the prior Bankruptcy Act, the Ninth Circuit Court of Appeals stated:

> "[W]e are unable to find any reason why the tax rate should not have been increased sufficiently to meet the District's obligations, or why it can be said that the plan is "equitable" and "fair" and for the "best interest of creditors" with no sufficient showing that the taxing power was inadequate to raise the taxes to pay them."

114 F.2d 563, 565-66 (9th Cir. 1940). See also Kelley v. Everglades Drainage Dist., 319 U.S. 415 (1943); 124 CONG. REC. H11864-66 (daily ed. Sept. 28, 1978).

30 See In re Sanitary & Improvement District No. 7, supra note 28 at 975-6.

31 119 B.R. 193, 195.

A Message from the Chair

By Stephen Millich, Esq.*

It is my great pleasure to announce that Ariel Pierre Calonne has been selected as Public Lawyer of the Year by the Public Law Section Executive Committee of the State Bar Of California. Mr. Calonne began his municipal law career in 1983, was named to his current position as the City Attorney of Palo Alto in 1990 and has served as the President of the City Attorneys Department of the League of California Cities in 1998-1999. He has created and continues to moderate the California City Attorneys electronic discussion group (currently around 470 subscribers). This creation is tremendously important to city attorneys throughout the state. Each municipal law practitioner now has access electronically to the knowledge and advice possessed by 470 other colleagues. The end result is an improved quality of legal services for the municipalities in the State of California and its residents.

Mr. Calonne will officially receive this well deserved award from California Supreme Court Chief Justice Ronald George on Friday, September 5th at a hosted reception from 4:30 to 6:30 PM in the Green Room of the Anaheim Hilton at the State Bar Annual Meeting. As members of the Public Law Section, you are invited and encouraged to attend. I hope to see you there.

* Stephen Millich (smillich@simivalley.org) is Chair of the Public Law Section's Executive Committee. He is Assistant City Attorney to the City of Simi Valley.

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